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Case and Comment

The Lawyers' Magazine—Established 1894

IN THIS ISSUE

Volume 56 No. 5

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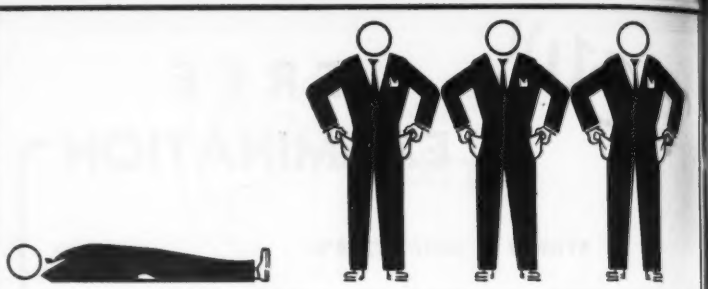

The case of the unsure sureties

(*Based on an actual occurrence*)

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• • •

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Legal Education in the United States... *An Australian View*...

By GEOFFREY SAWER
Professor of Law, Australian National University

Condensed from University of Western Australia Annual Law Review, December, 1950

THE United States of America is an extremely mixed up, devoluted, and variegated place, and its system of legal education is correspondingly complicated. I recently had the privilege of spending six months wandering about the major law schools of the country; the visit was not long enough to justify any confident generalizations even about the places I saw, but even casual impressions may have some value. Hence I hope that any criticisms of the American System in this article will be taken as relating solely to the possible application of American methods to Australia, and not at all to the suitability of those methods to the very different social and political conditions of the United States, and that in any event my American friends will regard my praises as outweighing my criticisms.

There are three main types of American law schools. First there are the hundred or so member schools of the Association of American Law Schools, which are also "approved" schools under the rules governing admission to practice in a large number of individual States. I shall call these standard schools. They are required to have at least four full-time teachers, a full-time teacher for every hundred students, a full-time dean, and a full-time librarian in charge of a separate law library. Secondly, there are the several hundreds of law schools, mostly not connected with any university, in which something like a full law training is given with the objective of getting students through State bar examinations, but which do not reach the requirements of the standard law schools. Many States require as a condition of admission to practice that students should have attended a standard law school, so that this second type of school exists only in the States which have not so provided. Most of these institutions are night schools. Thirdly, there are cram factories designed to enable graduates of the standard schools to pass State bar examinations.

The standard law schools have curricula which in principle deal not with the law of a particular State, but with some kind of generalized American law; a sort of "natural" law of the United States, or a scholarly idealization of the actual and varying State laws, or a sort of statistical average of the actual State laws. The extent to

which particular schools concentrate on the law of the State in which they are situate varies. Harvard might as well be in Washington for all the particular notice it takes of Massachusetts law, whereas Louisiana is proud of its peculiar Spanish-French code plus common law and devotes much time to it; Texas almost seems to be a sovereign country in loose alliance with the rest of the United States and accordingly concentrates heavily on its native institutions; and you get graduations between these two extremes.

The State bar examinations relate specifically to the law of the particular State, and accordingly the graduate of a national law school like Harvard, Yale, or Columbia may have to undergo a short cram course in order to pass a particular State bar examination. There is a National Association of State Bar Examiners which works in close and more or less friendly relationship with the Law Schools Association and with the American Bar Association. Nevertheless, from time to time there are complaints that the bar examiners have suddenly raised the standard in order to limit admissions.

The rules of the Law Schools Association, of the American Bar Association, and of many State bar admission committees, also lay down minimum requirements for the curriculum. At present, the student must first do two full years of prelegal training, consisting of two years of the course for the Bachelor of Arts degree, and then three years full-time law school training (or an equivalent length of part-time training). A good many law schools require three years prelegal training, and major national institutions such as Harvard and Yale require a Bachelor of Arts degree. Even in the schools which do not formally require that degree, competition for admission to a limited quota of law students per annum in fact often ensures that all the students will have such a qualification. Some States, notably New Jersey, require a period of service under articles before admission, and many allow such service as an alternative to attending an approved school; but the requirement of articles is exceptional.

Before I went on this trip I entertained a considerable admiration for this system, but after watching the Americans at work, both in the law schools and in the courts, I no longer think that a distinct slab of B.A. subjects and then a distinct slab of L.L.B. subjects are desirable. It may be that the quality of American college education is not altogether satisfactory so that at the end of two years of liberal arts or even with a Bachelor of Arts degree the law school fresher is too often unable either to think incisively or to write clearly. It may be that the American law schools are for the most part excessively given over to the teaching of the details of the legal system on crude Austinian assumptions, though this is certainly not so in the major national schools which teach

"American natural law." Whatever the explanation, it seemed to me that a good deal of the liberal arts part of the courses which ought to form such a valuable introduction to the law and ought even to mould the student's attitude to the technical law, is wasted. In most of the law schools the attitude of the teachers is that the sooner the student forgets all the economics, political science, sociology, and philosophy he may have learned "in college," the better. Yet the curious thing is that in many universities the particular subject of constitutional law is taught much better in the political science departments of the art schools than it is in the law schools.

Some of the law schools, notably Yale, are attempting to deal with this situation by "liberalizing" the law course itself. The Yale curriculum includes a good deal of what we would call Arts material; many of the law subjects proper are also treated in a manner which combines exposition of the formal rules with relevant analytical jurisprudence, legal history, and sociology of law. Most of the other great law schools warned me against Yale, claiming that it taught everything but law. Nevertheless, I witnessed a team from Yale beating all comers at a moot competition in New York judged by Mr. Justice Frankfurter (the competing teams came entirely from the Eastern States and there were some notable absentees, including Harvard); it seemed to me that the young men of Yale had learned a certain amount of legal doctrine as well as a good deal more about the art of argument, and I learned that although they usually need a cram course to get through the bar examination, they have no trouble in getting jobs thereafter.

Chicago is strong on logical analysis, and Harvard encourages its young men to frequent the adjacent Littauer School of Public Administration. After watching these phenomena, and listening to the very violent debates about the subject between the "teach 'em skills" and the "teach 'em citizenship" addicts at the Chicago Law Schools Conference, I naturally came to the conclusion that they were all wrong.

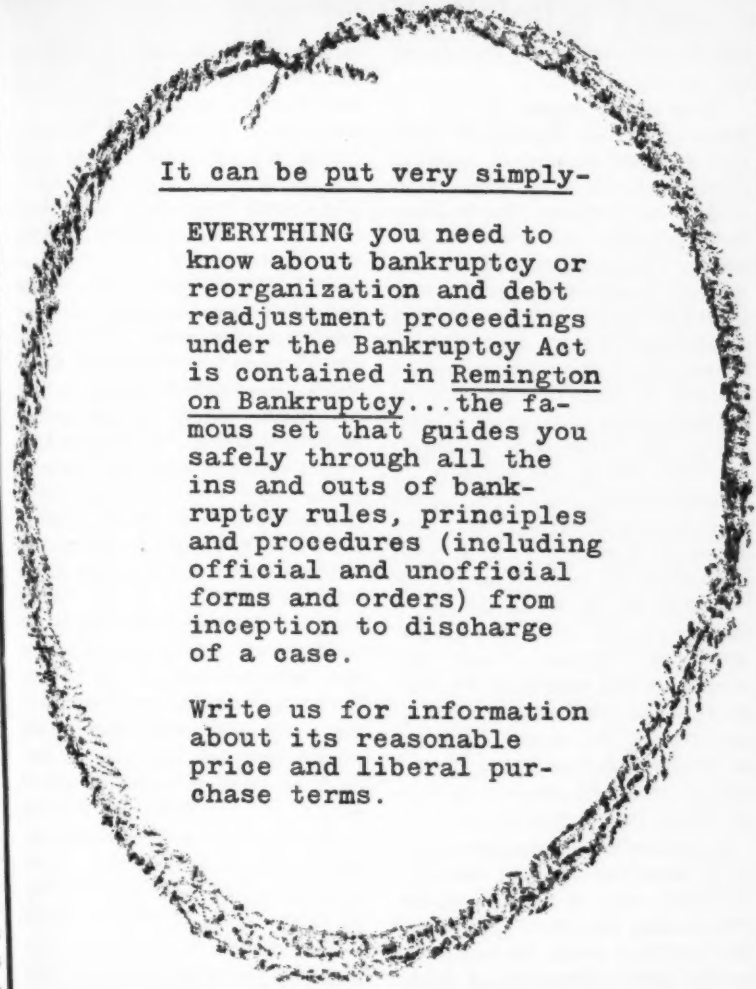
In my view the five or six years of a course combining liberal arts and law should be designed from the beginning as a law course, with sensible arts subjects leading immediately up to or accompanying related law subjects and with a broad cultural and sociological approach throughout. For example, it should include courses in English expression and in logic which would pay some, though by no means exclusive, attention to the particular problems of law; it should have political science running with constitutional law, instead of having the two subjects fighting each other as is frequently the case; and it should have contacts with elementary economics and business organization. In such a course there would be fewer options, both in the arts and in law subjects, than is

usual in the United States. I should hope that there would also be fewer short courses in specialized branches of the law lasting one semester. However, Australians could learn a good deal from the way in which particular subjects are handled in the schools which encourage unorthodox classification schemes; Constitutional Law at Chicago and Property at Yale are particularly interesting examples.

America is the home of the casebook system, so I expected to find the teaching method associated with it in universal use. I did find plenty of casebooks; indeed, it is so easy to put a casebook together that the teachers have almost given up the writing of institutional treatises, and the absence of satisfactory texts is one weakness in the whole scheme of legal education, as well as being a great pest to the Australian who wants to put on a show or erudition by hurling some American law at the High Court. But classroom methods are today much more like the lecture system we use in Australia; a few older teachers stick rigidly to cross-examining the class on its casebook, but the great majority interject a good deal of straight expository lecture material. Doubtless the absence of good textbooks has made this all the more necessary.

We could use the Socratic Method associated with casebooks more extensively in Australia, with advantage to both teacher and student, and the more so in subjects where the existence of a good textbook makes formal lecturing less necessary; but we should no longer expect the magic results from the casebook method which some of its earlier supporters predicted. The casebook has become almost a necessity in the United States, and is coming to be similarly necessary in Australia for quite other reasons, namely the great bulk of law reports and the high cost to libraries of repairing volumes too frequently thumbed by students. Recently there has been a tendency to elaborate the casebook into a collection of materials for students, including what might otherwise have been found in textbooks, and interlinking observations which might otherwise be obtained in lectures. The most noteworthy of these productions are as yet chiefly in mimeographed form and are confined to the particular university whose teachers have produced them, but doubtless some of them will before long be printed.

It can be seen that on American Association of Law Schools' standards, all Australian university law schools are below par. This, however, did not depress me as much as you might expect. We need more full-time teachers, longer courses with a better balance of arts and law subjects, more casebooks and textbooks adapted to our own needs; but these are matters of degree in which our rate of progress proportionately to population and resources has been good. Our students will stand comparison with all but the brilliant handpicked products of the



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two or three most sought after American schools.

There is one respect, however, in which our schools are very much behind the great majority of American schools, and that is in their "plant" as the Americans say. The buildings and equipment of most American standard schools are magnificent. Europeans sometimes complain a little about their taste. The Americans have an occasional tendency, not only in law schools, but in university architecture generally, to copy Chartres cathedral for their dining hall, put up a larger and gaudier version of Sancta Sophia for their library, and summon the students to classes with a bell ringing in a Leaning Tower of Pisa. Some degree of ostentation there is, partly because many of the buildings in question were erected during the age of millionaires—1920 to 1930—and presented by merchant princes who wanted to see something for their money. But whatever you think of the exteriors, the space, convenience, air-conditioning, moot rooms, libraries and so forth of the interiors are to an Australian beyond praise.

I must confess to a low-browed admiration for the style and decoration of a great many of these places, notwithstanding their frank imitation of English college gothic. The Law School at Ann Arbor (University of Michigan) is a harmonious collection of buildings around a handsome square which, if built in England in the 15th century, would now be regarded as an architectural show place. Some think that the Cornell law buildings are the most beautiful in the States; they too, are generally "old-fashioned" in design, though less obviously adapted from English originals than Ann Arbor. The Cornell library has a particularly beautiful ceiling, something after the style of the Merton Library roof at Oxford. Down south, many of the law schools have buildings with the handsome white porticos which Jefferson developed from the style of Wren. Yale's gothic style is perhaps a little too ornate, though its gymnasium, fourteen stories of dim religious light with a cathedral crypt and tower, is perhaps more strikingly inappropriate to this century than its Law School; the latter has delightful carvings and windows with satiric comments on the follies of the law, its teachers, and its students. Harvard Law School's two buildings are ugly, but they contain vast spaces with inter alia the best collection of Australian legal material in the world—far better than in any single Australian library—and hundreds of excellent early portraits of English judges. One could live very content teaching in a law school after the style of Ann Arbor, but situated on top of a hill like Cornell, with Harvard's library, and in one of the sunnier States—southern California or New Mexico. The salary, however, would need to be pretty considerable to attract an Australian meat-eater, seeing that steak is about twenty-seven shillings a portion.

The Trial at Coffin Tree

By

CRAIG CASTLE*

of the

Virginia and Mississippi Bars

"SINCE ther ain't but one lawyer in my court," the judge announced in a low voice, "I appoint Myron Lucas as lawyer for the Defense same as for the Territory. Might be a mite unusual, but the Constitution of the victorious Union gives a man a right to counsel; I aim for my court to be run right."

He stopped, glared at the mob packed in the French Lady Saloon, and spoke again: "How does this man plead?"

Nobody said a word. The men watched Myron Lucas pull himself up to his full six and one-half feet, walk to the side of the accused man, and stand thoughtfully silent for a moment. He carefully smoothed the wrinkled folds from the tails of his black frock coat. He was old, and he looked something like old U. S. Grant, under whom he had fought, only taller. Everyone said, even in a hole in the road like Coffin Tree, that he was a sure bet to be next Governor of the Territory.

"Not guilty, may it please the court," he said at last, "and as the Defense has no mind to prolong this trial unduly, the accused waives a jury trial and respectfully requests that the Court decide the case." A whisper became an ugly rumble and the men stirred impatiently.

"Order in this court—Order! Shut your mouths! Didn't he say it 'ud shorten things up?"

The boys shut up. If there was anything everybody wanted it was to shorten things up. And besides, it was the United States Marshal speaking and he had a loaded shotgun.

Ever since Gant Dawson had relieved old man Charley Rivers of his life by placing four slugs in his back, the feeling had been explosive. Gant had been content to perform his act at high noon in the street immediately adjacent to the French Lady and under full view of sixty-four witnesses—railroad hands lined up across the street for their pay—so you couldn't really blame the boys for being mad. It wasn't that the boys liked Charley Rivers, for they didn't; but that the old drunk owed something like three hundred dollars, all told, to the regular patrons of the French Lady.

THE TRIAL got down to brass tacks.

* Mr. Castle is now on active duty with the United States Navy.

Myron Lucas strode across the whiskey-soaked floor incessantly as he called witness after witness to the stand for the Territory. "Did you see Gant Dawson shoot Charley Rivers in the back?" he asked each one. To his one question, there was only one answer.

Myron Lucas turned finally to the spectators lined around the French Lady and summed up the case for the Territory.

"This is the damndest, meanest shooting I've heard tell of since the great Territory of Arizona was given life by the Almighty Union. I ask in behalf of the Territory that this—this man be hanged by the neck until he's dead as old Charley Rivers out there on Cemetery Ridge . . . ."

When Lucas had finished his tongue-lashing, the fire of hatred blazed in the eyes of the men, and a sudden movement would have recessed Gant Dawson's trial to the nearest tree without further ceremony. Dawson sat petrified, afraid to breathe.

BUT THE ONLY MOVEMENT was Myron Lucas himself stepping across the floor to the other side of the French Lady with four-foot strides.

"The Territory has rested its case," Lucas spoke now with a calm voice, "and this humble servant of the Court now turns to present the case of this poor, scared *hombre*."

Lucas suddenly stooped by Dawson and asked a question under his breath. He turned to the boys at the bar again, his face transformed into one of absolute compassion. "It's my personal opinion, gentlemen, that a man has sort of a natural inclination to shoot down an old codger who owed him four dollars and was two weeks late paying up. I ain't saying it's right, mind you, boys—I'm just saying it's a natural thing to do."

"But, boys," Lucas said as a tear trickled slowly down one cheek, "That's neither here nor there. There's someone else we must think of—I reckon she's out there in the hills somewhere in a cabin. Gentlemen, I'm speaking of this low-down skunk's mother who didn't deserve no son ornery and mean enough to shoot an old man in the back. Those gray hairs of hers don't need no more silver by reason of us going out and stringing Gant Dawson up. One man is dead and there ain't no use of us killing some mother's son to make it two." Lucas could see a softness creeping into the tough, baked faces of the men lining the bar. He concluded his argument.

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"I have one favor to ask of this court," old Lucas was almost shouting now, "and that is that I be allowed to pray for the Honorable Judge when he decides this case."

There wasn't a word said, but in a second Myron Lucas had already dropped to his knees and opened his prayer. As there wasn't a church in ninety miles of Coffin Tree most of the boys were not accustomed to prayer, especially in the French Lady, but some of them managed to get in the spirit. The proprietor of the French Lady took off his hat, and the others followed suit.

"Lord," Myron Lucas addressed his prayer with familiarity, "make the Honorable Judge remember that gray-haired woman out there in the hills when he gives this low-down *hombre* what's coming to him. There ain't never been a woman deserving such a son—and while You're at it, Lord, we ask Thy blessing on all the gray-haired mothers of these worthless section hands, cow-pokes, drunks, and gamblers here assembled. *Amen* and the Defense rests."

There was a calmness in the deathly silence which settled across the French Lady. The boys were moved. They would never deny that Myron Lucas was the slickest talking lawyer to hang out a shingle and put on a black felt hat in any town between New Orleans and San Francisco.

Suddenly the silence was broken as the tall figure standing by Gant Dawson walked slowly to the proprietor's personal chair, empty during the trial, and sat down. The same deliberate voice which opened the trial issued forth once more, and there was no mistake it was now *Judge* Myron Lucas speaking: "I was planning on hanging this man," he said, "but the counsel for the Defense has done so well, I feel constrained to send this man to prison for life."

"However, since this Territory don't have a prison of yet," he continued, "I reckon the hanging will do. After payment into court of whatever Gant Dawson might happen to have in his pockets for the payment of his lawyer, I direct that he be hung. Court Dismissed."

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The Root-Tilden Scholarships

A Unique Experiment in Legal Education

By EUGENE C. GERHART
of the Binghamton, New York Bar

Condensed from the American Bar Association Journal, March, 1951

UNIQUE in American legal education are the "Elihu Root-Samuel J. Tilden Scholarships," recently announced by the New York University School of Law. These scholarships, limited to study at the University's Law Center, will probably in many respects carry more weight, and be more eagerly sought after, than the internationally famous Rhodes Scholarships at Oxford University.

New York University Law Center was conceived and planned under the leadership of New Jersey's Chief Justice Arthur J. Vanderbilt when he was dean of the New York University School of Law. Judge Vanderbilt's goal as a law teacher has been to develop lawyers who, as Holmes said, live greatly in the law. He has fearlessly advocated the adaption of law to the circumstances of our changing society, to the needs of men in order that law, as a social science, may further promote human progress and happiness.

Judge Vanderbilt has said that there are five phases to the life of a great lawyer:

First, he must be a great advocate.

Second, he must be a wise counselor.

Third, he must be a leader in the activities of the organized Bar.

Fourth, he must be a public servant, in some public office.

Fifth, he must be recognized as a leader of public opinion.

In brief, the great lawyer is an outstanding leader. Therefore, the prime function of a first-rate law center must be to develop great leaders in the law.

The proposal of the Root-Tilden Scholarships Plan is to offer each year scholarships of $2100 each ($1500 living expenses and $600 for tuition) to twenty students, two from each of the ten Federal Judicial Circuits in the United States. These awards will be made in open competition. Awards will be made to candidates who rank highest in three fields:

1. Scholarship will be rated one-third.

2. Extracurricular activities, one-third.

3. Potential capacity for unselfish public leadership, one-third.

These scholarships have other unusual attributes. Judge Vanderbilt's thirty-four years as a courtroom law-

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In cases where the attorney does not specialize in fiduciary matters but undertakes such counsel as a service to a client — your Ætna representative's broad experience and familiarity with sources of information often saves considerable time for the attorney he serves.

These are only a few of the reasons why many leading attorneys call on their local Ætna Casualty and Surety Company representatives whenever they are obliged to obtain or advise on the procurement of a fiduciary bond. They find that the attorney and the representative of a good surety are natural partners — working for the protection of the clients they both serve.

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yer and law teacher, plus his twenty-eight years of experience in New Jersey politics, have convinced him of three major shortcomings of present-day legal and prelegal education. They are as follows:

1. The failure to teach procedure and judicial administration effectively, so that cases are tried without delay and are disposed of on their merits instead of technicalities.

2. The failure to teach public law, including international law, constitutional law and criminal law, in an adequate fashion.

3. The failure of colleges to give prelegal students a well-rounded prelegal education, with the result that lawyers are, with rare exceptions, inadequately equipped for public service or for leading public opinion. It is the aim of the Root-Tilden Scholarships to overcome each of these defects. Successful candidates will be selected each year by states first. It is expected that each state board of selection will consist of three public leaders, probably the president of the state bar association, the chief justice of the state, and the editor or publisher of a leading newspaper in that state. The circuit boards of selection will be composed of the Chief Judge of the United States Court of Appeals, the Chairman of the Federal Reserve Board for the district, and the president of a college in that circuit.

When the winners enroll at the New York University School of Law, their previous education will be carefully reviewed. They will each be required in law school to complete reading courses in those fields of the humanities, social sciences, history, and the methods of scientific research in which they are adjudged to be deficient if they are to become lawyers qualified for unselfish public leadership. They will be individually tutored in this work by the ablest men in the entire New York University faculty. An unusual feature of the plan is to give these picked men personal contacts with outstanding leaders in the fields of government, industry, finance and law so they will be constantly reminded of the fact that they are being prepared not only for personal success in the selfish competition to make a living, but also for unselfish public leadership in the area of the United States from which they have come.

The donor of the Root-Tilden Scholarships has expressed a preference for anonymity. The donor's action is predicated, in major part, on the importance to the nation at large of securing outstanding young men of sterling character and real ability as public leaders trained in the law. Since one of the most important parts of the project will be the selection of the successful candidates, it is clear that in choosing the successful scholars, particular emphasis will be placed on sound character, patriotism and judgment.

The Root-Tilden Scholarships are appropriately named after two of the most distinguished American lawyer-

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statesmen who were graduates of New York University School of Law. Samuel J. Tilden, Class of 1841, was one of the first graduates. Unrivaled leader of the illustrious Bar of his own day, he is even better known as a public servant. His great victory in smashing the notorious Tweed Ring in New York City, his purge of the state judiciary, his successful fight while Governor against the Canal Ring, brought him into national prominence. Although he received a plurality of the votes cast for the President of the United States in 1876, he proved more magnanimous in ultimate defeat than he could possibly have been in victory. He brushed aside the suggestion that he use force to assert his claim to the Presidency with these unforgettable words: "I would rather yield all claim to the Presidency than be the cause for one drop of my countrymen's blood being shed. I shall rely on the honor of the American people and the justice of our laws." He was not successful in the ensuing controversy—but he proved that he was a great lawyer.

A quarter of a century after Tilden's graduation, New York University School of Law graduated another eminent statesman of the law. Elihu Root, '67, is world famous for his work in international law, particularly in the field of arbitration. Besides his work as a leader in the movement for world peace through law, he served the nation as Secretary of War, Secretary of State and as United States Senator. He also stands out among American Lawyers for his work while president of the American Bar Association in 1915–16. It was Elihu Root who secured the adoption of higher standards of prelegal education. As a result of his efforts two years of college training became the general requirement for entrance into approved law schools rather than the previously accepted high school diploma.

It is appropriate that the new Law Center building itself will be known as Arthur J. Vanderbilt Hall. It is appropriate because the new Law Center will bring to fruition so many of the ideas and plans for improving our law, which have been conceived in the fertile mind of New Jersey's present Chief Justice. The new Law Center will develop a program of individualized training. Law will be taught—as he has long advocated—as an integrated system, like the "seamless web" it is, to use Maitland's metaphor, and not as a series of unrelated courses in water-tight compartments. The Root-Tilden scholars will be in contact with the Inter-American Law Institute and also with one of Judge Vanderbilt's most original and constructive ideas, the Citizenship Clearing House. The purpose of the latter is to encourage "young men of character, ability, and a sense of public responsibility to take an active interest in politics." They will have the company of men in the largest graduate law school in the country. And last—and far from least—these Root-Tilden scholars will

be in close touch from time to time with Judge Vanderbilt himself, who still maintains liaison with his legal love as President of the Law Center Foundation and as Chairman of the Law School Committee of the University.

Holmes once observed that the aim of a law school should be to make men, not smart, but wise in their calling—"to start them on a road which will lead them to the abode of the masters." And he added that "If a man is great, he makes others believe in greatness; he makes them incapable of mean ideals and easy self-satisfaction." The Root-Tilden Scholarships offer to promising young American law students the road to an abode of masters, the Law Center of New York University, where success for them is almost certain, where distinction is probable and future greatness a real possibility.

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The publishers of Case and Comment donate this space to the American Bar Association to permit the Association to bring to our readers matters which the Association deems to be of interest and practical help to the general practitioner.

NEW YORK CITY will play host to the number one legal event of 1951 when the American Bar Association's 74th Annual Convention opens at the Waldorf-Astoria Hotel on September 17th.

While the Empire State has been selected for no less than 21 previous meetings of the Association, the 1951 convention will be the first held in New York City. On nineteen occasions—during the early years of the ABA—meetings were held at Saratoga Springs, and Buffalo was host city in 1899 and 1927.

A large, comprehensive legal agenda, coupled with a nearly-exhaustive social program, should make the September 17–22 conclave the largest in Association history. The largest convention to date was the 60th meeting in Kansas City, Missouri, in 1937, when 4,172 members of the bar were in attendance. Last year's convention in Washington, D. C., was the second largest, with an attendance of 3,905.

Key affiliates of the ABA—including the Conference of Chief Justices, the Conference of Bar Association Presidents, and the Conference of Association Secretaries—will convene prior to the business sessions of the Assembly and House of Delegates scheduled for 10:00 a. m., Monday, September 17th. The meetings of the various local bar association representatives are of particular importance in the ABA program to assist city, county and state groups in the exchange of ideas and information on problems of common interest.

One of the most outstanding features of the Annual Meeting will be the Assembly Symposium on "The Menace of Organized Crime" on Wednesday, September 19th, which will be attended by some of the nation's leading authorities on law enforcement and criminal jurisprudence.

The American Bar Association Medal, the Ross Bequest Award and the Traffic Court Awards of Merit will be presented on Thursday, September 20th—a date which has also been selected for the Annual Dinner.

But the most important part of the Convention will be the "work-meetings" of the various sections, standing committees and special committees of the Association. Vital questions on national defense and security are high-

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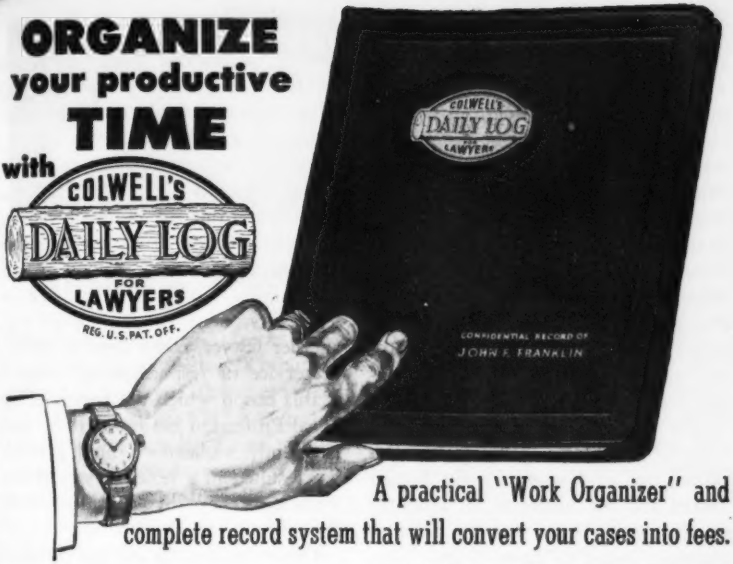

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on the agendas of the Special Committee To Study Communist Tactics and Objectives, the American Citizenship Committee, and the Committee on Peace and Law through United Nations. The latter committee has joined forces with the Section on International and Comparative Law to consider possible constitutional amendments with respect to the treaty-making power and the utilization of treaty reservations designed to protect and preserve the American Constitutional position.

The Junior Bar Conference will consider problems relating to the proper use of lawyers in the Armed Forces and the problems of winding-up the newly begun law practices of attorneys called to active duty.

While most of the efforts of the ABA committees—during the year and at Convention time—are devoted to public service, the new Special Committee To Study the Matter of Amendment to Canon 27 is involved with a problem which hits directly at every lawyer in practice today: a revision of the rules governing the advertising of professional services and the solicitation of legal business.

Another of the Canons of Professional Ethics is also under consideration—not from the point of view of its revision, but from the point of view of its violation. Canon 34 provides that "No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility." And it is this canon which the Survey of the Legal Profession has found to be most frequently violated—a finding which has resulted in a series of special conferences called by President Cody Fowler.

Other conferences and reports which should be of great interest to the bar involve the studies on retirement benefits for lawyers, the development of an administrative court, the creation of uniform substantive codes of criminal law, and the researches in marriage and divorce laws.

Enow Is Enuff

John Clerk, one of the most pugnacious of lawyers, once had a brush with the House of Lords. It seems that he preserved the old-fashioned "enow," whereas his younger brethren said "enough" (enuff). Retaining this old usage while presenting his argument, he was interrupted by the Lord Chancellor saying, "Mr. Clerk. In England we sound the 'ough' as 'uff.' 'Enuff' not 'enow.' "

"Very well, my Lord," continued the very self-possessed advocate, "of this we have had enuff; and I now proceed to the subdivision of the land in dispute. It was apportioned into what in England would be pluffland, a pluffland being as much land as a pluffman can pluff in a day."

The Lord Chancellor could not withstand the apt riposte and burst into laughter, saying, "Proceed, Mr. Clerk, I know enow of Scotch to understand your argument."—*Ladies Home Journal.*

Among the New Decisions

Adequate Damages — *death.* An action for wrongful death was brought in Wood v. St. Louis Public Service Co., — Mo —, 228 SW2d 665, 17 ALR2d 868, on behalf of two minor children of the decedent-mother, who was killed as a result of a collision between an automobile driven by her husband and a streetcar of the defendant. Plaintiffs predicated recovery on negligence of the motorman in not keeping a vigilant watch and in not stopping the streetcar in time to avoid the collision with the skidding automobile.

The father testified that he was supporting the plaintiffs; no evidence as to the performance of services by the mother was produced; the jury could have found that the father was guilty of contributory negligence contributing to the fatal collision; and the applicable statute authorized the consideration of mitigating circumstances in determining damages.

Upon appeal from a judgment rendered on a verdict for $5,000 for the plaintiffs, the Supreme Court of Missouri, Division No. 2, adopting the opinion of Commissioner Bohling, held, upon complaint by the defendant, that a submissible case was presented by the evidence and, upon complaint by the plaintiffs of the gross inadequacy of the verdict, that the jury, in view of the circumstances, could not be said as a matter of law to have abused its discretion.

The appended annotation in 17 ALR 2d 872 collects the cases, reported since and including the year 1941, in which the courts have passed upon the adequacy of damages awarded in actions for personal injuries resulting in the death of adults.

Administrative Procedure Act — *construction and application.* The essence of Mr. Justice Frankfurter's opinion in Universal Camera Corp. v. National Labor Relations Bd., 340 US 474, 95 L ed (Adv 304), 71 S Ct 456, to this extent concurred in by all the other Justices of the United States Supreme Court, is that the Administrative Procedure Act and the Taft-Hartley Act direct that reviewing courts must now assume more responsibility for the reasonableness and fairness of decisions of the National

Labor Relations Board than some courts have shown in the past. In particular, it was held that in determining whether an order of the Board is supported by substantial evidence, the court should take into account whatever in the record fairly detracts from the weight of the evidence, and that the court is precluded from sustaining an order merely on the basis of evidence which in and of itself justifies it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

It was also held, Justices Black and Douglas dissenting, that, in determining the substantiality of the evidence in the record, a report of a trial examiner, who observed the witnesses, should be given reasonable weight, even though his findings have been reversed by the Board.

The appended annotation in 95 L ed — discusses the "Construction and application of the Administrative Procedure Act."

Adverse Possession — *tacking.* Alukonis v. Kashulines, — NH —, 70 A2d 202, 17 ALR2d 1125, was an equity suit to quiet title tried before a jury in which it was held that the trial court's exclusion of a certain argument made by defendants' counsel was erroneous and necessitated a new trial. But it was further held, in view of evidence from which the jury could properly find that plaintiff and her predecessors in title had fenced in the disputed strip of land, cultivated it, and for thirty-five years exercised gen-

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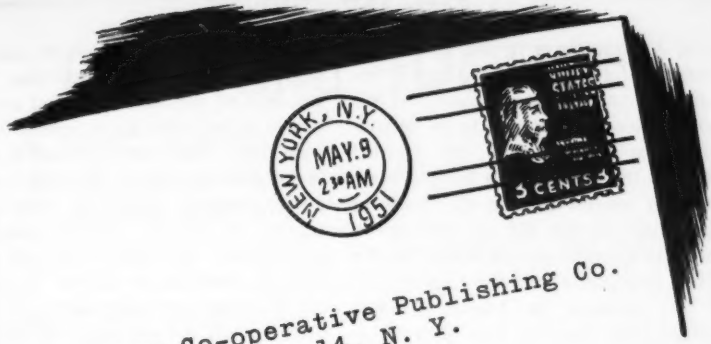

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eral dominion over it, that defendants' motions for nonsuit and directed verdict had properly been denied. In this connection the contention of defendant that plaintiff was not entitled to tack the possession of her predecessors in interest because the deeds in her chain of title did not include the strip in question was overruled by the New Hampshire Supreme Court.

The opinion, by Justice Blandin, pointed out that the rule forbidding tacking where the plaintiff's deed does not include the disputed land is strictly limited to cases where only the deed is relied on, and there are no circumstances showing an intent to transfer any property beyond the calls of the deed. In the present case the evidence showed that plaintiff had been shown by her predecessor boundaries which included the strip in dispute and that this tract had been inclosed and cultivated for many years by plaintiff and predecessors, which was held sufficient to support plaintiff's right to tack.

The appended annotation in 17 ALR 2d 1128, entitled "Tacking adverse possession of area not within description of deed or contract," supersedes an earlier annotation on this question.

Attorneys' Fees — *percentage basis.* Three persons, a corporation (E) and two individuals (K and L), entered into an agreement to purchase and resell army trailers. To assist K to purchase the trailers, he was given a note by E, secured by a mortgage on the trailers. The note included a provision for the payment of all costs and legal expenses incurred in its collection in an amount not less than 20 per cent of the amount unpaid when it was turned over to an attorney for collection. This note was used by K as collateral security in obtaining from a trust company the money to buy the trailers. L gave K a written guaranty against loss. The parties were able to sell only a few of the trailers. K paid off the trust company, and received back the note and mortgage. An action was brought by K against L on the guaranty, and L was held liable, but not for the costs and expenses of collection. An action was then brought in Leventhal v. Krinsky, 325 Mass 336, 90 NE2d 545, 17 ALR2d 281, by L against K and E for the appointment of a receiver to take possession of the trailers, in which counterclaims were set up by K against E and L. The trailers were sold by the receiver, and the proceeds deposited by him. E being held not liable on the note, the principal controversy was between K and L as to which one was entitled to the proceeds of the trailers.

The Massachusetts Supreme Judicial Court, in an opinion by Justice Ronan, held that K was entitled to the proceeds, on the theory that, although the note had been paid in full by L, K was entitled to all the costs and legal expenses incurred in the various proceedings incidental to its collection, up to 20 per cent of the amount of the note. L's right of subrogation to the proceeds was held not to arise until K had been reimbursed for these costs

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and expenses. The provision in the note for the costs and expenses was held to be a valid one. The judgment in the first action was held to be conclusive as to the validity of the note and K's nonliability for the costs and expenses.

The "Validity of provision in promissory note or other evidence of indebtedness for payment, as attorneys' fees, expenses, and costs of collection, of specified percentage of note" is discussed in the appended annotation in 17 ALR2d 288.

Bailee of Airplane — *liability for damage.* Vee Bar Airport v. De Vries, — SD —, 43 NW2d 369, 17 ALR2d 909, was an action by the proprietor of an airport and flying school against a student for damage to an airplane. The student had obtained a private pilot's license but was taking further instruction to obtain a commercial pilot's license. He crashed while executing a maneuver known as elementary eights or pylons. On the last turn he fell considerably below the minimum 500-foot altitude, and, in attempting to regain altitude, a gust of wind tipped his right wing, and the plane stalled and crashed.

The issue was whether the crash was due to the student's negligence or his mere lack of skill and inexperience. The South Dakota Supreme Court, in an opinion by Justice Rudolph, held this, under all the evidence, to be a question for the jury. Damage through mere lack of skill was held to be a risk which the school assumed in letting the student take the airplane.

"Liability of bailee of airplane for damage thereto" is the title of the appended annotation in 17 ALR2d 913.

Books of Account — *admissibility.* A bill for an accounting under a contract whereby the defendants agreed to cut timber and manufacture it into lumber and the complainant agreed to pay a fixed price therefor and advance certain sums for the purchase of machinery and equipment was brought, in Edgewood Lumber Co. v. Hull, 32 Tenn App 577, 223 SW2d 210, 17 ALR2d 228, upon abandonment of the contract by the defendants. Entries in permanent books of account were made by the complainant's bookkeeper from temporary memoranda prepared by lumber graders who measured the lumber and made tickets or tally sheets. No evidence was introduced in contradiction of any specific items in the book accounts.

A decree for the complainant for the amount shown by the book accounts, less certain specified credits, was affirmed by the Court of Appeals of Tennessee, Middle Section, in an opinion by Justice Howell, which held that ledger sheets taken from the books of account and filed as exhibits to the testimony of the bookkeeper were admissible in evidence as books of original entry.

"What constitutes books of original entry within rule as to admissibility of books of account" is the subject of

the extensive appended annotation in 17 ALR2d 235.

Bottled Gas — *liability for injuries.* The defendant in Graham v. North Carolina Butane Gas Co., 231 NC 680, 58 SE2d 757, 17 ALR2d 881, was a gas company furnishing butane gas for household use. Its truck driver was delivering gas into a storage tank at the plaintiff's home. A leak developed in the gas range in the kitchen. Though informed of the leak, the truck driver continued to fill the tank, stating that he would check the leak later. When the tank was filled, he went into the kitchen to help locate and fix the leak. The gas was not cut off at the tank. He adjusted the pilot light, trying it with his cigarette lighter. He then turned on the master burner, with his cigarette lighter still lit. An explosion occurred, and the house was destroyed by fire.

Taking the evidence in the light most favorable to the plaintiffs on motions for compulsory nonsuits, the opinion of Justice Ervin of the North Carolina Supreme Court held that the defendant gas company was liable for the negligence of the truck driver, on the ground that, although it was not responsible for the defective condition of the gas range, it was under a duty to stop further delivery of the gas as soon as such defective condition became known.

The appended annotation in 17 ALR2d 888 discusses "Liability of one selling or distributing liquid or bottled fuel gas, for personal injury, death, or property damages."

Civil Rights — *criminal liability.* In Williams v. United States, 341 US 97, 95 L ed (Adv 524), 71 S Ct 576, the head of the detective agency who was instrumental in obtaining confessions by force or violence, appealed from his conviction under § 20 of the Criminal Code (now 18 USC § 242), making it an offense to deprive an inhabitant of a state of his constitutional rights under color of law. It appears that the defendant held a special police officer's card issued by a city and had taken an oath as such officer; and also that a regular police officer was detailed to attend the investigation.

Under these circumstances five of the Justices of the United States Supreme Court, in an opinion by Mr. Justice Douglas, held that the defendant was acting "under color" of law within the meaning of § 20, and that this provision, as applied to the facts of the instant case, was not unconstitutional on the ground of vagueness.

Justices Frankfurter, Jackson, and Minton dissented on the grounds that § 20 lacks the definiteness required by the Constitution for criminal laws, and that, in any event, it was never designed to cover a case of wrongful use of power by a state official.

A discussion of the United States Supreme Court cases concerned with "Criminal liability for depriving, or conspiring to deprive, a person of his

civil rights," will be found in the appended annotation in 95 L ed —.

Civil Rights — *damages under.* A combination to break up by force and threats of force a meeting called for the purpose of adopting a resolution on a matter under consideration by Congress, of which the persons breaking up the meeting disapproved, while leaving undisturbed other meetings in support of the contrary view, is not one for which an action for damages can be maintained under a statute (8 USC § 47(3)) giving a right of action for conspiring and acting in furtherance of the conspiracy for the purpose of depriving any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the law, according to the majority of the United States Supreme Court in Collins v. Hardyman, — US —, 95 L ed (Adv 806), 71 S Ct 937. The opinion is by Mr. Justice Jackson.

The dissenting opinion, in which three of the Justices concurred, is to the effect that Congress has power to create a federal cause of action in favor of persons injured by private individuals through the abridgment of federally created constitutional rights, and has done so by the statute in question.

A discussion of the federal cases concerned with "Liability in damages for conspiring to deprive a person of his civil rights" will be found in the appended annotation in 95 L ed —.

Communist Party — *judicial aspects of membership.* Without notice or hearing, and claiming authority

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under the President's Executive Order No. 9835, the Attorney General included three organizations, ostensibly of a charitable nature, in a list of groups designated by him as communist. As required by the order, the list was transmitted to the Loyalty Review Board, and disseminated by the board to all government departments and agencies, for use in administrative proceedings for the discharge of disloyal government employees, in which membership in a communist or otherwise subversive organization was a factor to be taken into consideration in determining disloyalty. Raising various constitutional objections and asserting that they were organized for a permissible purpose only, the organizations, in separate proceedings, sued the Attorney General for declaratory and injunctive relief, seeking the deletion of their names from the list because of the resulting harm to their activities. The government's motions to dismiss the complaints were granted by the courts below, in two cases on the ground that the complaint failed to state a cause of action, and in the third case on the ground that the plaintiff had no standing to sue.

These dismissals were reversed in Joint Anti-Fascist Refugee Committee v. McGrath, 341 US 123, 95 L ed (Adv 556), 71 S Ct 624, by five of the Justices of the United States Supreme Court. These five Justices agreed, though on different grounds, that the complaining organizations had standing to sue. Although not all of them

"She played this part on the screen once."

expressly mentioned the point, they also proceeded on the theory that the actions presented a justiciable controversy.

The appended annotation in 95 L ed —— discusses the "Supreme Court decisions involving membership in Communist Party."

Criminal Law — *double jeopardy.* At a former trial the defendants in United States v. Williams, 341 US 58, 95 L ed (Adv 502), 71 S Ct 581, had been prosecuted for having used third degree methods to force confessions from prisoners, one of them aiding and abetting the others. Specificially the indictment charged them with depriving the prisoners, under color of state law, of rights protected by the Fourteenth Amendment, and, in other counts, with conspiracy to deprive the prisoners of these rights. As to the substantive charges one of them was convicted, the others were acquitted, after all defendants had testified, the acquitted defendants stating that they had not seen the convicted co-defendant abuse the prisoners. As to the conspiracy charges the jury was unable to agree; and on appeal from a conviction on these charges at a second trial upon a new indictment, the Court of Appeals quashed the conspiracy indictment. In the present proceeding the defendants were charged with perjury committed at the first trial, but the District Court dismissed the indictment.

Reversing the court below, the United States Supreme Court, in an opinion by Mr. Justice Reed, held that the convicted defendant was not put in double jeopardy, as the offenses were not the same; that the acquitted defendants could not rely on their acquittal as conclusively establishing the fact that they had not seen their co-defendant assaulting the prisoners, as they might have seen him and yet not be guilty; and that the court at the former trial, having jurisdiction to try the case, was a "competent tribunal" within the meaning of the federal perjury statute, even though subsequently the conspiracy indictment was quashed on appeal.

"Acquittal or conviction as bar to prosecution of accused for perjury committed at trial," as reflected by the federal cases concerned with this question, is the subject of the appended annotation in 95 L ed ——.

Discovery — *trade secret, formula, etc.* The plaintiff, in Putney v. Du Bois Co., 240 Mo App 1075, 226 SW2d 737, 17 ALR2d 375, sustained injury to her hands while working as a dishwasher in a lunch counter in a department store. The defendant was the

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manufacturer of the washing compound used in the store. The plaintiff filed interrogatories asking the defendant to reveal the ingredients of the compound and the proportions used therein. The defendant claimed that these were trade secrets, and refused to answer, claiming that the plaintiff should first be required to make out a prima facie case, and that the information should only be disclosed secretly to the judge. Default judgment was entered against the defendant for refusal to answer.

In upholding the judgment, the Missouri Court of Appeals, in an opinion by Justice Blair, held that any information essential to the plaintiff's case could not be withheld, even though it involved trade secrets.

The appended annotation in 17 ALR 2d 383 collects and discusses the cases passing upon the question whether the courts may or will order discovery or inspection of matters which constitute a trade secret.

Divorce — *connivance at spouse's adultery.* The defense set up in Woodbury v. Woodbury (1949) Prob 154, (1948) 2 All Eng 684, 17 ALR2d 334, a wife's action for divorce, was her connivance at her husband's admitted adultery. Originally the adulterous relationship had occurred without the knowledge of the wife who, upon learning thereof, tried unsuccessfully to break it up. In an extremely distraught condition because of the affair the wife thereupon wrote letters to her husband and his mistress suggesting that the latter continue as friends and lovers, that the husband and wife continue such relationship in name, but that their child should not be taken to visit the mistress who for some time had been governess of the child. This suggestion was not acted upon and the wife, apparently repudiating the same, sought a reconciliation on the basis of her husband giving up his adulterous conduct. Mistakenly believing herself successful in the latter attempt, the parties cohabited again as man and wife until the wife left for the United States with her child to protect the child from the dangers of war bombings. While there, many letters were exchanged between the parties in some of which allowances were remitted by the wife to the husband.

An appeal from a decree nisi granted the wife was dismissed by the English Court of Appeal, Probate Division, in opinions by Lord Justices Bucknill, Somervell, and Tucker, who agreed that the conduct of the wife should be viewed as a whole and not by considering the letters in isolation, and held that the circumstances above set forth did not constitute connivance precluding a divorce on the ground of adultery.

The annotation in 17 ALR2d 342, entitled "What amounts to connivance by one spouse at other's adultery," discusses the American and British cases involving this question.

Due Process Clause — *effect on state power to regulate insurance.*

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California Automobile Assoc. v. Maloney, 341 US 105, 95 L ed (Adv 496), 71 S Ct 601, involved a mutual insurance association whose right to do business in California had been revoked for its failure to comply with a statute which made it mandatory on all automobile liability insurers to subscribe to a plan for the equitable apportionment among such insurers of applicants who are in good faith entitled to but are unable to procure such insurance through ordinary methods. The association challenged the validity of the statute under the due process clause of the Fourteenth Amendment.

In an opinion by Mr. Justice Douglas, the United States Supreme Court sustained the statute as valid.

Mr. Justice Black held that the appeal should be dismissed on the ground that the constitutional questions were frivolous.

The appended annotation in 95 L ed ——, entitled "State's power to regulate insurance business as affected by due process clause," collates the United States Supreme Court cases concerned with this question.

Excessive Damages — *death.* A decedent, for whose wrongful death the action in De Toskey v. Ruan Transport Corp., — Iowa —, 40 NW 2d 4, 17 ALR2d 826, was brought by his administratrix, was at the time of the fatal accident engaged in his duties as fireman on a railroad engine which collided at a railroad crossing with a truck owned by defendant.

A judgment entered on a verdict for $10,000, appealed from on the basis of its claimed excessiveness only, was affirmed by the Supreme Court of Iowa, notwithstanding a prior payment of $13,325 to the administratrix by the railroad company for a covenant not to sue. The opinion, by Justice Wennerstrum, reviewed the elements of damages properly considered in an action for wrongful death and held the amount of the verdict to be justified by the circumstances. The decedent had been regularly employed as a railroad firemen for thirty years, was sixty-one years of age, was of industrious habits and in good health and had a life expectancy of 13.47 years. His gross wages for the prior year had been $4,409.40, and he left cash and bonds of the value of $1,000. He was survived by a widow and four mature children.

The appended annotation in 17 ALR 2d 832 collects the cases, reported since and including the year 1941, in which the courts have considered the excessiveness vel non of particular awards of damages for personal injuries resulting in the death of adults. In addition, a number of cases are included where the amount of damages was set by the court, without the aid of a jury verdict.

Federal Tax Liens — *priority of.* Summary certificates of assessment of federal taxes were received in the office of the Collector of Internal Revenue, and notices of federal tax liens against the taxpayer's property were properly filed and recorded, subsequent to the

date of an attachment lien but prior to the date the attachment creditor obtained judgment. Under the pertinent state law the attachment lien was inchoate and contingent upon the creditor's obtaining judgment. In United States v. Security Trust and Savings Bank, 340 US 47, 95 L ed (Adv 51), 71 S Ct 111, the United States Supreme Court, in an opinion by Mr. Justice Minton, held that the tax lien was superior in right to the attachment lien.

In a concurring opinion, Mr. Justice Jackson relied primarily upon § 3672 of the Internal Revenue Code, providing that a tax lien shall not, until notice has been properly filed, be valid against mortgagees, pledgees, purchasers, or judgment creditors, but not mentioning attachment creditors.

The subject of the appended annotation in 95 L ed —— is "Priority of federal tax lien, as affected by § 3672 of the Internal Revenue Code."

Free Speech and Press — *Supreme Court cases.* Leaders of the Communist Party were convicted for violation of the provisions of the Smith Act directed at conspiracy to teach or advocate the overthrow of the government by force or violence. The conviction was challenged by them on various constitutional grounds. In Dennis v. United States, — US —, 95 L ed (Adv 865), 71 S Ct 857, six members of the United States Supreme Court sustained the conviction, holding that the provisions of the Act did not, inherently or as construed and applied in the present case, violate the First Amendment and other provisions of the Bill of Rights, nor the First and Fifth Amendments because of indefiniteness.

Mr. Chief Justice Vinson, with the concurrence of three other Justices, based the decision on the ground that the trial court properly ruled as a matter of law that there was a clear and present danger of the evil which Congress had a right to prevent. Two other Justices concurred on other grounds.

Two Justices dissented, primarily on the ground that there was no clear and present danger which would justify the statutory restriction on free speech.

The appended annotation in 95 L ed — discusses the Supreme Court cases concerned with "The right of free speech and press."

Full Faith and Credit Clause — *state court's duty.* The Wisconsin courts dismissed an action for the death in Illinois of a citizen of Wisconsin, against another citizen of Wisconsin and an insurance company incorporated in Wisconsin, brought by an administrator there appointed, on the ground that the Wisconsin death statute giving a right of action for wrongful death had, by a proviso that such action shall be brought for a death caused in the state, established a local public policy against entertaining suits brought under the wrongful death acts of other states. In Hughes v. Fetter, — US —, 95 L ed (Adv 822), 71 S Ct 980, the United States Supreme Court held, five to four, in an opinion by Mr. Justice

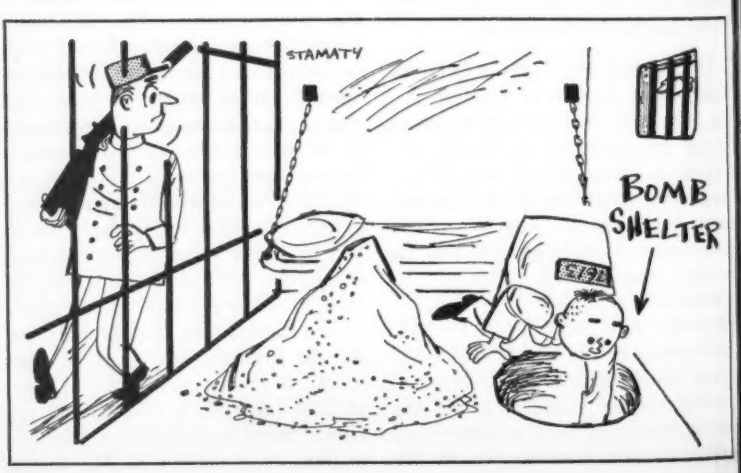
Black, that the local policy must yield to the constitutional requirement that full faith and credit must be given in each state to the public acts of any other state.

Mr. Justice Frankfurter, in whose dissenting opinion three other Justices joined, expressed the view that the Supreme Court should not require that the forum deny its own law and follow the tort law of another state where there is a reasonable basis for the forum to close its courts to the foreign cause of action, and that a reasonable basis exists in the case of death actions.

A discussion of the Supreme Court cases concerned with "Duty of state courts, under full faith and credit clause, to give effect to rights created by statute of a sister state" will be found in the appended annotation in 95 L ed —.

Gift Tax — *Federal.* Spouses effected a settlement of their respective property rights for the purposes of a divorce, providing that the agreement should be submitted to the divorce court for its approval and making it conditional upon the entry of the decree. It was also provided that the agreement should survive the divorce decree, and the decree so ordered. The pertinent state law instructed the divorce court to decree an equitable disposition of the properties of the parties.

Although recognizing that a postnuptial property settlement, as a general proposition, is subject to the federal gift tax, five of the Justices of the United States Supreme Court, in an opinion by Mr. Justice Douglas, held in Harris v. Commissioner, 340 US 106, 95 L ed (Adv 79), 71 S Ct



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181, that the agreement described above was not so taxable.

The "Federal Gift Tax" is the subject of the appended annotation in 95 L ed —.

Immigration Acts — *moral turpitude within.* In Jordan v. De George, 341 US 223, 95 L ed (Adv 648), 71 S Ct 703, conspiring to defraud the United States of taxes on distilled spirits was held by six members of the United States Supreme Court, in an opinion by Mr. Chief Justice Vinson to be a "crime involving moral turpitude" within a statute making two convictions ground for deporting an alien if his crimes involve moral turpitude. In view of the fact that the courts have very generally regarded crimes of which fraud is an element as involving moral turpitude, the statute was held not to be so indefinite as to deny due process.

Mr. Justice Jackson, with the concurrence of Justices Black and Frankfurter, dissented on the ground that the statute has no sufficiently definite meaning to be a constitutional standard for deportation.

The appended annotation in 95 L ed —, entitled "What constitutes a crime involving moral turpitude within meaning of immigration acts," discusses the federal cases concerned with this question.

Injury by Animal — *in public place.* Gedra v. Dallmer Co., 153 Ohio St 258, 91 NE2d 256, 17 ALR2d 453, involved a situation in which a patron in a theater was bitten by a rat which had been attracted by a package of meat which she had brought into the theater and placed on an adjoining seat. There was conflicting evidence as to the care taken by the proprietor of the theater in rat-proofing the building. There were several restaurants and grills in the neighborhood infested with rats. The plaintiff's principal witness, an exterminating expert, admitted that it would be impossible to keep rats completely out of the theater.

The opinion of Justice Stewart of the Ohio Supreme Court, held that, even assuming lack of care on the part of the theater proprietor, the plaintiff had failed to negative the possibility that the rat which bit her had come into the theater from adjoining premises, and that, its origin being a matter of pure guess or conjecture, the injury was not shown to have been caused by the theater proprietor's lack of care.

The appended annotation in 17 ALR 2d 459 discusses the liability of an owner or operator of a place of public resort, other than an animal exhibitor, for injuries by animals or insects to patrons or invitees.

Intoxicated Passenger — *carrier's duty and liability.* McMahon v. New York, New Haven & Hartford Railroad Co., 136 Conn 372, 71 A2d 557, 17 ALR2d 1081, was an action for the death of plaintiff's intestate wherein it appeared that he boarded defendant's train in an intoxicated condition and continued his drinking after such

boarding; that defendant's agent opened the doors to the vestibules between the cars and the trap doors protecting the steps leading out of the vestibules, and left them open during the latter part of the trip; that defendant's trainmen were aware of deceased's condition; that deceased staggered onto the vestibule platform between two cars and descended the steps while the train was in motion; that a trainman discovered deceased in this situation and tried to persuade him to come back into the vestibule; and that shortly thereafter deceased fell from the train, his body being subsequently found on the right of way.

Finding no error in the verdict and judgment for plaintiff entered in the trial court, the Supreme Court of Errors, in an opinion by Justice Jennings, defined the abstract duties of a common carrier to an intoxicated passenger, and upheld the action of the trial judge in leaving to the jury the question whether the defendant was guilty of negligence in leaving the vestibule and trap doors open between stations.

An exhaustive discussion of the "Duty and liability of carrier to intoxicated passenger while en route" is contained in the appended annotation in 17 ALR2d 1085.

Leased Motor Vehicle or Machine — *liability for operator's tort.* The plaintiff in Pennsylvania Smelting & Refining Co. v. Duffin, 363 Pa 564, 70 A2d 270, 17 ALR2d 1384, hired from the defendant, a general contractor, a crane together with an operator. Due to the latter's negligence the plaintiff suffered damages, for which he brought action against the defendant.

The defendant had given the operator no instructions when he departed with the crane, and the lessee, upon the operator's arrival with the crane, explained to him the work to be performed, the place where it was to be performed, and certain dangers involved. The operator remained on the defendant's payroll and under the renting agreement the defendant had the power not only to send an operator of his own choice, but at any time at his pleasure to take the operator off the job and substitute another. The lessee was not in the business of operating cranes and did not interfere with the operation of the crane or assume to direct and control the operator.

In an opinion by Justice Stern, the Supreme Court of Pennsylvania held the defendant liable on the ground that under these circumstances the operator of the crane remained in the employ of the defendant and did not become an employee of the plaintiff.

"Liability under respondeat superior doctrine for acts of operator furnished with leased machine or motor vehicle" is discussed in the extensive appended annotation in 17 ALR2d 1388.

Life or Accident Insurance — *policy provision as to aeronautics.* In the action on a policy of life insurance in McDaniel v. California-Western States Life Insurance Co., 181 F2d 606, 17 ALR2d 1036, it appeared that before the insurer would accept the in-

sured's application it required the attachment of an aviation exclusion rider limiting the company's liability to a return of the premiums paid, plus interest, in the event the insured met his death "as a result of travel or flight in or upon any kind of aircraft, or from falling or otherwise descending therefrom or therewith during said travel or flight." A copy of such rider signed by the insured was attached to the policy, which was returned to the insurer, but the insured failed to sign the copy thereof which was left in his possession. It was stipulated by the parties that insured died when the plane in which he was riding with other navy personnel during the progress of simulated antisubmarine operations crashed at sea for causes undetermined, and that a search instituted immediately thereafter indicated that the plane had disintegrated upon impact with no possibility of survivors.

The Fifth Circuit, in an opinion by Circuit Judge McCord, held that, under the circumstances shown, the insured must be presumed to have known and assented to the provisions of the aviation exclusion rider. It was also held that the manner of insured's death brought it within the aviation exclusion clause, with the result that a recovery of no more than the amount of the premiums paid, plus interest thereon, was permissible.

The appended annotation in 17 ALR 2d 1041 entitled "Construction and application of provision of life or accident policy relating to aeronautics" col-

"—But don't you see, Miss Laree?—You can't get alimony when you're only engaged."

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lates the cases which have arisen since the date of an earlier annotation on this question.

Miller-Tydings Act — *construction and application.* The plaintiffs, foreign corporations, obtained agreements with Louisiana retailers to sell their products at a minimum price. Although under Louisiana law these agreements were binding upon nonsigners, a retailer who refused to sign such an agreement sold the plaintiffs' products at a cut-rate price. The plaintiffs sued for an injunction, relying upon the Miller-Tydings Act, which exempts contracts prescribing minimum prices for the resale of trademarked commodities from the prohibitions of the Sherman Act where such contracts are lawful under local law.

In an opinion by Mr. Justice Douglas, six members of the United States Supreme Court held in Schwegmann Bros. v. Calvert Distillers Corp., — US —, 95 L ed (Adv 684), 71 S Ct 745, that enforcement of the price arrangement against a nonsignor violated the Sherman Act, since only voluntary minimum price arrangements were excepted therefrom by the Miller-Tydings Act. Three members of the Court dissented on the ground that the latter act was intended to immunize state fair trade laws, including their "nonsigner" provisions, against charges under the Sherman Act.

The members of the Court also disagreed as to the weight to be given to the legislative history of the Miller-Tydings Act. Two of the Justices, concurring in the opinion of the Court, rested their decision solely upon the language of the act, holding it unnecessary and improper to inquire into its legislative history. On the other hand, the other Justices composing the majority, as well as the dissenters, relied upon the legislative history, but disagreed as to its significance.

The appended annotation in 95 L ed — collates the federal cases concerned with the "Construction and application of the Miller-Tydings Act."

Motor Vehicles — *wrongful parking or stopping.* A collision between a bus stopped in violation of a statute requiring stopped or parked vehicles to be parallel with, and within a specified distance of, the curb and a negligently operated automobile resulted in injuries to a passenger on the bus, who brought an action in Northern Indiana Transit v. Burk, — Ind —, 89 NE2d 905, 17 ALR2d 572.

Upon appeal by the defendant bus company from a judgment rendered on a verdict for the plaintiff, the Supreme Court of Indiana, in an opinion by Justice Emmert, held that common carriers were not excused from compliance with the statute, that violation of the statute was prima facie evidence of negligence, that the burden was thereby cast upon the defendant to produce evidence to show an excuse for violation, such as mechanical failure, congested traffic situation, or the like, and that the absence of such excuse rendered the violation negligence as a matter of law. The further contention

that violation of the statute only created a dangerous condition which was not the proximate cause of the collision, by reason of the intervening negligence of the motor vehicle operator, was rejected by the court, which, because of the reasonably foreseeable nature of the latter negligence and the continuing nature of the original negligence, regarded the two acts as contemporaneous. The judgment was, however, reversed because of a refusal to withdraw from the jury consideration of the issue of failure to give statutory signals for a stop notwithstanding the absence of evidence to justify submission thereof.

A discussion of the "Construction and effect in civil actions of statute, ordinance, or regulation requiring vehicles to be stopped or parked parallel with, and within certain distance of, curb" is contained in the appended annotation in 17 ALR2d 582.

Official Information — *governmental privilege.* An employee of the Federal Bureau of Investigation refused to comply with a subpoena duces tecum, relying upon an order of the Attorney General which withheld from his subordinates the power to release department papers, but authorized them to submit subpoenaed material to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed.

The opinion of Mr. Justice Reed, in United States ex rel. Touhy v. Ragen, 340 US 462, 95 L ed (Adv 345), 71 S Ct 416, held that the Attorney General can validly withdraw from his subordinates the power to release department papers. It was also held that the employee's refusal to produce the papers was proper, since unlimited disclosure was requested and he was at no time questioned as to his willingness to submit the papers for determination as to their materiality. Mr. Justice Frankfurter, in a concurring opinion, pointed out, however, that the Attorney General cannot forbid every subordinate who is capable of being served by process from producing relevant documents, and then contest a requirement upon him to produce on the ground that he cannot be reached by legal process.

The appended annotation in 95 L ed — collates the federal cases which discuss "Governmental privilege against disclosure of official information."

Privileged Communications — *marital.* In Blau v. United States, 340 US 332, 95 L ed (Adv 234), 71 S Ct 301, the United States Supreme Court held that a husband is entitled, upon a claim of privilege of confidential communication, to refuse to reveal the whereabouts of his wife, who is wanted by a grand jury in connection with an investigation concerning the activities and records of the Communist Party in Colorado, where the wife knew that she was so wanted, but hid out, apparently so that process could not be served upon her, and several of the witnesses who appeared were put in jail for con-

tempt of court. The opinion is by Mr. Justice Black. Mr. Justice Minton, with the concurrence of Mr. Justice Jackson, dissented.

The appended annotation in 95 L ed — discusses "Privilege of marital communications in federal courts."

Real-Estate Broker's Bond — *liability on.* In Phillip Metropolitan Colored Methodist Episcopal Church v. Wahn-Evans & Co., 153 Ohio St 335, 91 NE2d 686, 17 ALR2d 1007, a real-estate broker undertook to arrange for the financing on a sale of church property. A deposit was made by the prospective purchaser, to be applied on the purchase price or returned if the transaction failed. The seller's acceptance provided that the deposit should go to the broker as part of his commissions. The transaction fell through when the broker was unable to arrange the financing, but he refused to return the deposit.

The statute licensing brokers provided for a bond, conditioned to indemnify anyone damaged by the broker's failure to comply with the statutory requirements. One of these requirements was that the broker should account for and remit moneys in his possession belonging to others.

In the action by the purchaser on the bond, the Ohio Supreme Court, in an opinion by Justice Matthias, held the surety liable for the broker's failure to return the deposit.

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bility on real-estate broker's statutory bond" is discussed in the appended annotation in 17 ALR2d 1012.

Self-Incrimination — *waiver or loss of privilege.* A witness testified that, by virtue of her office as treasurer of the Communist Party, she had been in possession of books and records of the Party, until she turned them over to another, but refused to disclose the name of the recipient, relying upon her privilege against self-incrimination.

In an opinion by Mr. Chief Justice Vinson, five of the Justices of the United States Supreme Court held in Rogers v. United States, 340 US 367, 95 L ed (Adv 374), 71 S Ct 438, 19 ALR2d 378, that the witness was not justified in refusing to answer, primarily because, after her disclosure of membership in the Party, an answer could no further incriminate her.

Mr. Justice Black, with the concurrence of Justices Frankfurter and Douglas, dissented on the grounds that the witness never intended to waive her privilege; that her testimony, standing alone, did not amount to an admission of guilt or furnish clear proof of crime; and that the question as to the name of the recipient of the books and records called for additional incriminating information.

The federal cases which are concerned with "Waiver or loss of privilege against self-incrimination, as regards person other than accused," are discussed in the appended annotation in 95 L ed —.

War Risk Insurance — *risks covered.* Standard Oil Co. v. United States, 340 US 54, 95 L ed (Adv 106), 71 S Ct 135, involved a situation in which a tanker, insured with the Government against war risks, including "all consequences of hostilities or warlike operations," collided with a United States Navy minesweeper performing a warlike operation, with fault on the part of both vessels. The Court of Appeals, contrary to the District Court, denied the Government's liability under the war risk clause on the ground that it was not shown that the minesweeper's warlike operation had caused the collison. The owner of the tanker sought certiorari without specifically relying on the divergence below in the findings of fact on the question of causation.

Six of the Justices of the United States Supreme Court, in an opinion by Mr. Justice Black, held that review was limited to the question whether as a matter of law the war risk clause covered the loss, and answered this question in the negative.

Mr. Justice Frankfurter, with the concurrence of Mr. Justice Jackson, dissented on the ground that review extended also to the question of causation and that the Government was not relieved from responsibility merely because both vessels were at fault.

Mr. Justice Douglas also dissented, expressing the view that the loss was covered by the war risk clause.

The appended annotation in 95 L ed —, entitled "Risks covered by war

risk property insurance" discusses the federal cases concerned with this subject.

Will or Deed — *purported limitation of gift absolute in terms.* By the will for which an action for construction was brought in Hanks v. McDanell, 307 Ky 243, 210 SW2d 784, 17 ALR2d 1, real and personal property of the testator was left to his wife "to be used, enjoyed and disposed of by her in any way she may choose with this provision however—that, should any of said property belonging to my estate remain at the death of my said wife, the same shall be divided equally among" designated persons, the defendants herein. Some years later, the wife died leaving all her estate to the plaintiff devisees who contended that the wife had acquired an absolute fee in the property under the will of her husband.

A judgment sustaining the contention of the defendants, that the wife took a life estate with power of disposition and that the limitation over to them was valid, was affirmed by the Court of Appeals of Kentucky. The opinion, by Justice Thomas, overruling earlier decisions supporting the so-called "Biting" rule, adjudged that, notwithstanding an apparent initial gift or grant of a fee title in a will or deed, it is competent for the testator or grantor by subsequent provision to reduce that title to a life estate, and that a limitation over upon death of the first taker is valid.

The extensive appended annotation in 17 ALR2d 7 discusses "Gift or grant in terms sufficient to carry the whole property absolutely as so operating where followed by a purported limitation over of property not disposed of by the first taker."

Left, Right?

The august members of the U. S. Supreme Court recently posed for their official picture, and Associate Justice Tom Clark stepped a trifle out of line.

"Mr. Justice," the photographer begged, "please step a little more to the left."

"Oh, no," said Justice Clark, with a twinkle, "Not any more to the left!"

—DOROTHY MCCARDLE, N A N A.

A Goodhearted Judge

The judge had just awarded a divorce to a wife who had charged non-support.

"And," he said to the husband, "I have decided to give your wife $50 a month."

"That's fine, Judge," the man replied, "and once in a while I'll try to slip her a few bucks myself."—Tax Topics.

A Court Reporter Speaks

Some Hints on Expediting and Reducing the Cost of Litigation

By BEN D. KELLER

Official Reporter, Twelfth West Virginia Judicial Circuit

Reprinted from the West Virginia State Bar News, July, 1950

THAT litigation is expensive and time-consuming can hardly be denied. From his neutral corner this reporter believes that there are ways to speed it up, to reduce its costs, and to promote accuracy. A few of the many little means to that end, important in the aggregate, are here discussed briefly.

Take *trial maps in land litigation* for example. The practice of using letters to indicate boundary-points practically precludes accuracy without the squandering of much time and many pages in explanations that would be needless were numerals used instead. The typical question, "Tell the jury how that boundary is designated on the trial map," may bring the answer, if letters are used, "From B to AJ to HA, thence to P, D and T and back to B." Anyone with dictating machine experience will recognize instantly the opportunities for confusion and error there. But if figures are used instead of letters and the answer is "From 2 to 34 to 45, thence to 6, 7 and 8 and back to 2," nobody is confused and no repetitions are necessary.

Then there is *the use of pompous Latin-derived words in the examination of a lay witness* instead of employing their blunt, unmistakable Anglo-Saxon synonyms that predominate in the spoken language. Substituting the vernacular for such words as prior, previous, observe, frequent, subsequent, acquire, accompany, reside, and several others will result in a surprising increase in clarity, avoid much exasperating explanation, repetition and confusion, and save many a written page of transcript . . . and printing.

Colloquy sometimes engendered by objections is another fruitful source of increased costs and is the cause of much concern to the conscientious reporter. One lawyer wants everything reported and transcribed; possibly his opponent wants only the objection and its grounds. Some courts have criticized records filled with colloquy. The reporter occupies a neutral position. If the lawyers deem the colloquy of sufficient importance to take up the time of the court, twelve jurors, the witnesses, court attachés and other counsel with it, is the reporter justified in assuming that it is unnecessary and in leaving it out? What is he to do? The lawyers control the record, and it

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seems clear that the way to prevent this sometimes needless waster of time and money is to refrain from colloquy that adds nothing of value to the record.

The *expert witness* furnishes another source of needless expense and repetition. Eager to air in the courts his profound knowledge of the nomenclature of his calling, he speaks in technical language that no lay juror can be expected to understand, resulting in much repetition, explanation and confusion at the expense of the innocent litigant. A "pre-trial conference" with the expert should convince him that the best interests of everybody concerned, including himself, will be served by couching his answers in commonly understood, homely language so far as that is possible.

The *marking of exhibits* ought to be and can be a simple, fool-proof thing instead of the involved process some lawyers would make it. Is there any sound argument against consecutive numerals, allowing the use of a numbering machine with its mechanical accuracy? Duplication of markings is thus avoided and the assembling of the exhibits becomes a simple matter. Isn't such identification as positive as, for example, "Defendant's Exhibit John Q. Doe Contract of September 19, 1946"? And here is an excellent place to urge and insist upon the actual physical marking of the exhibit when it is first referred to, thus avoiding much possible later confusion.

Another source of confusion occurs when the witness answers, "About as far as from here to the window," which means exactly nothing to the reviewing court. Or the witness may say, "It went in here and came out back here." The reporter has neither the time nor the authority to interpret the answer thus: "It went in here (indicating a point two inches above and one inch to the right of the left nipple) and came out back here (indicating a point 1½ inches to the left of the fifth lumbar vertebra)." Ordinarily opposing counsel will stipulate, if so requested, the locations and distances referred to and much needless waste of time and money in repetitions can be thereby avoided. Too, when the witness waggles his head or lifts an eyebrow in answer to a question, the notation "witness nods" or "no audible answer" will appear in the record in the absence of insistence upon a spoken answer, and here again it should be remembered that the lawyer controls the record.

Much time wasting, confusion, expense and inaccuracy may be avoided if the lawyer will divest himself of the idea that the reporter is a worker of miracles. Often in heated cross-examination both lawyer and witness will be speaking at the same time, with opposing counsel objecting, and when it is considered that all three may well be speaking at the rate of three or four or more words each second, it ought to be quite apparent that a verbatim record would indeed be a miracle.

And all too often, at just such a spot, when the lawyer has drowned out the answer by another question which the witness didn't hear because he too was talking, will come the petulant demand, "Read the question, Mr. Reporter." Now, reading back is an entirely different process from writing; the abrupt transition from the one to the other throws the reporter off-stride; and often before the reading is finished the lawyer or the witness is off again and the reporter is further handicapped in his writing. Obviously such procedure does not promote accuracy, and just as obviously, it piles up unnecessary costs. Here again hasn't the lawyer a definite responsibility not to impose upon the reporter impossible conditions?

Countless reams of paper have been unnecessarily used, countless dollars charged for question-and-answer transcription of purely formal matter, and the subsequent printing thereof, when every legitimate purpose would be adequately served by a narrative transcript. A stipulation of counsel will often result in substantial savings in such cases. The conscientious reporter wants to do his work in the most acceptable manner and is never happy about transcribing and charging for useless matter.

The recent development of fast and comparatively cheap reproduction of typewritten matter may offer a possible partial solution of the problem of time and expense involved in appeals. A study of the possibilities is now under way by both lawyers and reporters, and important results are hoped for.

In emphasizing the value of thoughtful co-operation between lawyer and reporter it must be kept in mind that the lawyer, not the reporter controls the record; and it must be remembered too that needless costs entering into the reporter's transcript will be multiplied when the record is printed.

Certainly opportunities exist for at least mitigating the clamor against the excessive cost of litigation, and certainly lawyer and reporter ought to work together to that end.

So Lives the Judge

In the Netherlands there are stonecutters who live in obscure little huts and each day they weigh on their scales jewels so precious that any one of them would suffice to take them out of their poverty forever. But at the end of the day, when they have returned the jewels to their anxious owners, they sit down serenely to dinner. On the same table where they weighed another's treasure without envy, they spread their frugal meal. So lives the judge. He decides enormous issues involving other men's treasures, and even their lives, but after he has polished his opinions so that they will reflect the brilliancy of his wisdom he retires to a simple life of learning and serenity.

—Louis Nizer, in the Alabama Lawyer

The Swing of the Pendulum

From Overestimation to Underestimation of International Law

by JOSEF L. KUNZ
Professor of Law, University of Toledo

Condensed from The American Journal of International Law, January, 1950

THE history of man's spiritual activities, of his attitude toward the world and life as a whole as well as toward particular problems shows a continuous swing of the pendulum from one attitude to the opposite one. And as, in order to establish the new attitude, very likely a distorted picture of the former one will be given, and as the new attitude, once established, itself often goes to extremes, the pendulum not only swings from one side to the other, but from one extreme to the other.

Thus classicism is followed by romanticism in the field of art, literature and music. The pendulum of philosophy swings between idealism and realism, between idealism and materialism; only the spirit counts, says Hegel; there is only matter, says Marx. Centuries of faith in reason and natural law are followed by the utmost positivism of Comte. In the realm of law natural law with its extravagant claims is followed by strict legal positivism. The optimism of the nineteenth century is followed by the pessimism of the twentieth.

This swing of the pendulum is, of course, particularly great in periods of fundamental crisis like our present epoch, where the very survival of our Western Christian civilization is in question, where the very ideals on which this civilization rests are questioned and attacked. Insecurity is the mark of our epoch and it shows itself everywhere. The pessimism of an age of crisis makes men pessimistically doubt whether social relations are soluble at all.

As far as the attitude toward international law goes, a period of overestimation, so characteristic for the years between the two World Wars is followed by a period of underestimation. It is, to a great extent, the change of attitude which spells the difference between the League of Nations and the United Nations.

At the end of the first World War fought under the leadership of Woodrow Wilson "to end war," boundless optimism prevailed. There was everywhere, in victors, neutrals and vanquished, not only the will to achieve a better world through international law, but also the firm conviction that it could be done. Hence, the

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bitious experiment of the League of Nations. Away with power politics! Democracy and the rule of international law will change the world.

In all the dealings of the League, international law was at the heart of the discussion. Idealistic approach, optimism, emphasis on international law created the "Geneva atmosphere." The legal department of the League played a great role; the Permanent Court of International Justice was frequently resorted to. The Mandates Commission was primarily moved by legal considerations. Legal arguments were the core of every debate; every delegate knew that he must justify his attitude legally. Hence, greatest importance was given to international law in the foreign offices.

And outside of Geneva, the very existence of the League, the foundation of the Permanent Court of International Justice, created enthusiasm and led to an overestimation of the efficacy of international law. An enormous number of legal studies on the League were published in all languages. The teaching of international relations centered on international law and the League. The Rockefeller Foundation created the Geneva Institute, the Carnegie Endowment, the Hague Academy of International Law. The literature on international law was greatly influenced by this general trend of optimism.

The Covenant did not go to extremes; it recognized realistically that war can be successfully eliminated only insofar as peaceful substitutes are created; it laid down only "obligations" (in the plural) not to resort to war. Mr. Kellogg himself never made extravagant claims for the Kellogg Pact.

Even under this optimism the facts were, from the beginning, different. Old-fashioned alliances against Germany and Hungary were concluded "dans le cadre de la Société des Nations," under the escape clause of Article XXI. Geneva oratory was contradicted by what the states did. The Corfu incident in 1923 gave a foretaste of the unreality of "collective security" in the face of a Great Power.

Then came the flagrant violations of the "thirties," climaxing in the second World War. They had, as a first effect, the going to extremes, especially by a literature of wishful thinking. Fancy interpretations of the Kellogg Pact were put forward; the more "collective security" was shown to be non-existent, the more the utopian writers emphasized it. The more the facts were in contradiction to their writings, the more lyrical they grew. The confusion between lex lata and lex ferenda, the mistaking of often contradictory trends and tendencies for new rules of international law already established, the mistaking of Geneva—or Pan American—oratory for facts grew worse.

The events of the "thirties" also had the opposite effect: The time was ripe for the swing of the pendulum to the other extreme, from overestimation to underestimation of international law

from the emphasis on international law to the emphasis on power, from optimism to pessimism, to the new "realistic" approach. Already books published in the "thirties" show this new approach.

During the second World War the new "realism" appeared in state action and literature. The three leading statesmen on our side were all realists. The bases-destroyer deal and Lend-Lease were moves of a realistic policy; legal considerations were less prominent. Not peace through law, but security through power, became the dominant idea and shaped the thinking as to a new world organization, built upon "more realistic bases" than the League. Power, held by the Big Three, and, therefore, their predominance, became essential. In the field of international law important writers came to the conclusion that it is for all practical purposes dead.

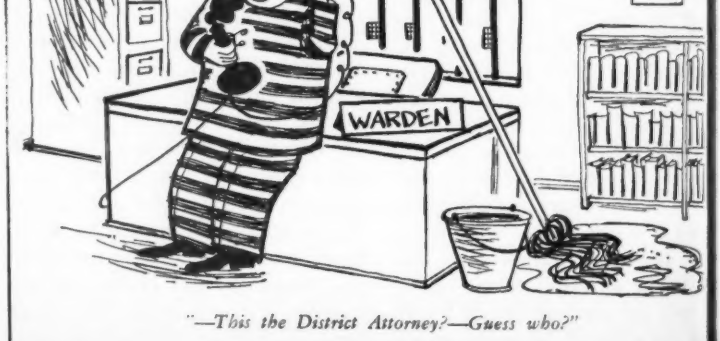
The Dumbarton Oaks Proposals do not even mention international law. Only the Chinese proposals and widespread criticism brought about the inclusion of international law in the Charter of the United Nations. The "realism" of the Charter can be seen in the Trusteeships, as distinguished from the League Mandates, in the relative unimportance of the disarmament problem, in the powers of the Security Council as well as in the "veto" given to the permanent members, in the fact that the Security Council, deciding "upon the existence of any threat to the peace, breach of peace or act of aggression," is not bound by rules of international law, so that its "measures" must not necessarily be sanctions in the juridical sense, contrary to Article XVI of the Covenant. Also the practice of the United Nations is certainly very different from that of the League. Legal questions play a subordinate role at the United Nations and in diplomatic correspondence. The International Court of Justice is not overburdened; whether its advisory opinion on the admission of new members will be heeded, remains to be seen. The oratory contrasts strikingly with that of Geneva. If the most undiplomatic language, bitterness, invectives and political propaganda constitute realism, then there is plenty of realism at Lake Success (lucus a non lucendo).

The new "realism" makes itself felt everywhere. International law as a special subject has been dropped as an examination topic for entrance into the U. S. Foreign Service. It is significant that the Rockefeller Foundation and the Carnegie Endowment, although certainly many other motives were of influence, have withdrawn their subventions from the Geneva Institute and the Hague Academy. Although the Carnegie Endowment—traditionally a bulwark of international law—continues to do much for international law, for publications on and the teaching of international law, the new "realistic" tendencies can be seen in top decisions of recent years. The whole trend in teaching international rela-

tions shies away from international law and puts the focus on politics and power. Excellent international lawyers have, so to speak, "deserted" international law and gone with flying colors into the "realistic" camp. The balance of power is being honored again and Macchiavelli quoted with approval.

Yet, even under the United Nations and in the literature, not everything is "realism." The United Nations is based on the belief of the continued co-operation of the "Big Three," although a study of world history from oldest times could have shown that alliances of heterogeneous states are likely to disintegrate, as soon as the common enemy is vanquished. It was not foreseen that the "realistic" veto may lead to paralysis. It was not seen that "collective security" and other tasks cannot be fulfilled by an association of "sovereign equal States," which has scrupulously to respect the "domaine réservé" of the members. The facts are as under the League. As there is no collective security, new alliances and counteralliances are concluded, shamefully veiled as being "within the framework of the U. N."—only the language has changed since League times from French to English. And both camps again make use of the two escape clauses—the West of Art. 51, the East of Art. 107. Far reaching utopian schemes appear also under the reign of the United Nations and a new utopian trend—"world government" and so one—can be seen in some parts of the literature.

Insofar as the new "realism" tend



"—This the District Attorney?—Guess who?"

to correct mistakes of the earlier attitude, insofar as it is directed against the overestimation of international law, it is to be welcomed. International lawyers must not forget that international law does not operate in a vacuum, that even proposals de lege ferenda have sense only within the boundaries of political possibilities of being realized at a particular juncture of history. They must not confuse the law that is with their wishful thinking. They must recognize that many of their utopian proposals presuppose a world state under world law, whereas the present international community is only a loose society of sovereign states under international law and is likely to remain such for the foreseeable future. Good international lawyers, who, as lawyers, are trained in looking to the law that is and to realities, rarely make this mistake.

But insofar as the new "realism" tells us that there is nothing but power and that international law is "sterile," insofar as it tends toward an underestimation of international law, it must be opposed with all energy. In so doing, it sins against its own "realism." It is not true that problems of international law "are largely irrelevant." International law is a factor in international relations. Municipal law, too, moves in a political atmosphere. Will this country, therefore, accept Hitler's "Might is right" or Lenin's "Law is politics"? Ubi societas, ibi jus. The law has necessarily to play an important role, and so has international law. Extremes are always wrong: the truth lies in the golden middle way. The correct attitude must be equidistant from utopia, from superficial optimism and overestimation and from cynical minimizing; neither overestimation nor underestimation. International law is "neither a panacea nor a myth."

A New Ground for Objections

A young lawyer represented one party in a recent case before Judge Donald E. Martin in the Kansas City, Kansas, City Court; experienced counsel represented the opposing party. The older lawyer was "digging in" on an opposition witness, trying to bolster a rather weak case by skillful cross-examination. In this process he asked a question which had definitely dangerous possibilities to his opponent's case.

The young lawyer leaped to his feet, moved his hands, and frantically shouted, "Don't answer! Don't answer! Your Honor, I can't think of any good objection, but I know he shouldn't answer that question."

The objection was sustained—amid the laughter of all present, the older lawyer laughing loudest of all.

Contributed by: Judge C. Clyde Myers
of Kansas City, Kansas, City Court

The Gift Tax Lien *and the* Examination of Abstracts

By WIRT PETERS AND TOM MAXEY*

Condensed from Miami Law Quarterly, December, 1950†

SHOULD an attorney unconditionally pass upon the title to real property without first determining whether any owner, including any co-tenant, had acquired or transferred the property within the past ten years for less than an adequate and full consideration in money or money's worth? This inquiry relates equally to property acquired from a decedent, although for purposes of this discussion the former will be emphasized.

The Imposition of the Lien

The similarity of the lien for unpaid gift taxes and the lien for unpaid estate taxes is particularly evident. Section 1009 imposes a gift tax lien on the subject matter of the transfer for ten years from the time made, while § 827(a) fixes an estate tax lien for the same period.

The gift tax lien arises spontaneously whenever a taxable transfer is made and attaches immediately and automatically to the property at the time of the gift, although the computation of the amount of the tax may be impossible before the end of the calendar year and the tax is not even due until the following March 15th. While the estate tax is not due until 15 months after death, a lien for that tax attaches to the gross estate at the very time of death.

There is, of course, no requirement relating to the filing of an assessment list nor for the recording of any liability anywhere. Neither is there any requirement relating to the giving of notice in order for the liens to come into existence and attach to the property as, obviously, no demand for payment of the tax could be made until, at least, it was due. Rather, the subsequent purchaser has the burden of establishing that he had no indication of the lien or knowledge of facts intimating the possibility of it in order to have the property divested of the lien in his hands.

The Liability of the Donee, Transferee, or Beneficiary

Further similarity of these liens appears in the provisions relating to the personal liability for the payment of the tax by the individuals who receive

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† The condensation here used is reprinted from The Monthly Digest of Tax Articles, February, 1951.

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the property. Sections 1009 and 827 (b) impose a personal liability on the transferee in the event of non-payment.

A comparison of these provisions indicates that, while the personal liability for the unpaid gift tax on the part of the donee arises regardless of the kind of property interest received, that for the estate tax arises only in certain instances. The property required to be included in the gross estate of the decedent is regarded as being of two kinds: Type 1, the interest of the decedent in the property at the time of his death; and Type 2, the interests of others, in property which must be included in his gross estate, which mature by reason of the death of the decedent. It is only in connection with Type 2 that the personal liability of the recipient for any of the estate tax arises, although the estate tax lien itself attaches to all the property of the estate.

A General Lien for Unpaid Federal Taxes

In addition to the gift tax and estate tax liens, there is another lien provided by §§ 3670, 3671, and 3672(a). This does not arise until a demand for payment of the tax has been made and the assessment list has been received by the collector.

It is a general lien upon all the property of the one who owes the tax, not merely upon specific property which may have been acquired in some particular manner, i.e., by gift or by reason of another's death. It is not vaild against any mortgagee, pledgee, purchaser of judgment creditor until notice has been filed by the collector in the office in which the filing of such notice is authorized by the law of the State.

In Detroit Bank v. United States (317 US 329, 1943), the interplay of these provisions was in issue. The court reviewed the legislative history of the two sections, and concluded that it was intended that each section should operate separately and independently of the other.

Therefore, the estate tax lien attached to the property at the date of death without assessment, demand, or filing, and was superior to all subsequent liens even though accrued in good faith and without actual notice. The court also considered the legislative history of the gift tax lien and concluded that it, too, was intended to operate as a separate lien in addition to that provided in § 3670.

Divestment of the Liens

Any of the property covered by the gift tax lien which is disposed of by the donee to a bona fide purchaser for an adequate and full consideration in money or money's worth is divested of the lien. As to the estate tax lien only those specified property interests received by the beneficiaries which made them personally liable for the tax are divested of the lien when sold to a bona fide purchaser for an adequate consideration. There is no provision relating to the divesting of the lien from the other property included

in the gross estate when it is sold to a bona fide purchaser.

The essential elements for a bona fide purchase of realty are:

1. full and adequate consideration;
2. a purchase in good faith;
3. absence of notice, actual or constructive, of any outstanding rights and of any circumstances which would put a prudent man on inquiry concerning them.

Notice

Notice presents the problem. If it can be said that there is notice of a possible gift tax lien in the various entries in the abstract, or the public records themselves, then before passing upon the title, we must ascertain the existence of the lien. If, on the other hand, we can satisfactorily conclude that the abstract can be said not to contain a notice of such a possible lien, then no further inquiry is necessary.

The application of the gift tax upon purchases by a husband and wife as co-tenants, regardless of the type of tenancy, has been frequently brought to the attention of the profession. When one spouse furnishes the consideration for a purchase of property on which title is taken in the names of both spouses as co-tenants, the other spouse takes her interest by gift.

Thus, this is a taxable transaction. A gift tax may be due depending upon the available exemptions and a lien attaches to the property for the payment of the tax. In the event this property is then sold within a ten year period, what is the status of the lien and what is the position of the purchaser?

Let us first assume a series of entries in the abstract of title you are examining which rather obviously indicate that the wife probably acquired her interest by gift. Suppose that John Doe purchased some property prior to his marriage and that afterwards, having heard somewhere that married couples could advantageously hold their property in tenancy by the entirety, he conveys his title to himself and his wife using a third-party conduit.

Now, even with no further information, have you not been given sufficient notice of facts which indicate that a transfer of a property interest may have been made without an adequate and full consideration in money or money's worth; that, therefore, a gift tax may have been due; and that a lien for the tax has automatically attached to the property? Having due regard for the nature of the gift tax lien, if it can be said that you have been given such a notice, then your client can not be such a bona fide purchaser as to divest the property of the lien.

The holding of title by the husband and wife as co-tenants is only one of the more common and obvious indications of a possible gift tax lien to be found in the abstract. However, if notice of the lien can be found to exist in any one situation, the notice will be found in connection with the indication of any taxable transfer.

For example, property conveyed to a trustee can usually be presumed to

have been conveyed without an adequate consideration. Certain transfers of property in connection with divorce proceedings would raise a question in the mind of a tax counsel. Even in connection with property acquired by distributees from an intestate, if they agree to take other than equally, a gift tax may be due and a gift tax lien raised on the property coming through an estate.

Transference of the Lien to Other Property

Let us suppose that the donee has disposed of the specific property acquired by gift to a bona fide purchaser in such a manner as to divest that property from the lien for the gift tax. We are still not free from difficulties inasmuch as the law provides that in these circumstances the lien, to the extent of the value of such gift, shall attach to all the property of the donee, including after-acquired property, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth.

So, the circle starts again, and years later, perhaps in some obscure and unrelated transaction, some piece of property may be found subject to a lien for unpaid, long forgotten, gift taxes. The donee is truly the modern Sinbad saddled with his own Old Man of the Sea.

Certificate of Release

There are statutory provisions for the issuance of a certificate of release from the lien. The very method by which the property is to be certified as free of the lien may well have been provided by Congress as one of the more effective means by which the gift tax was to be enforced. By simply requesting the Commissioner for a release, he is notified of the possibility of a tax.

The Liability of the Attorney

For eighteen years the gift tax has been treated almost as a step-child of the revenue system; it has been much neglected, and there has been little effort toward enforcement. Accordingly, many attorneys are not so familiar with the gift tax as with some of the other federal taxes, and therefore the payment of the gift tax on transfers of property interests without adequate consideration has been widely evaded.

Now, with additional revenues becoming increasingly more necessary, it is entirely possible that the Treasury Department may turn some attention upon this already assessed but neglected source. A concerted effort to collect the taxes which have become due during the past ten years, but which have remained unpaid would produce enormous revenues for the government and just as enormous difficulties and problems for those liable for the tax and their attorneys.

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THE REAL McCOY

JUDGE HOOVER

in

McCoy v. McCoy, 98 NE2d 435—Court of Common Pleas, Cuyahoga County, Ohio

THIS is a feud of the McCoys—not with the Hatfields—but with the McCoys, over the right to use their celebrated Irish name in the furniture business.

Plaintiffs, George and Mabel McCoy, are partners, both in matrimony and in the furniture business. They are neither kith nor kin to the defendant, Leo McCoy. Both George and Leo were born McCoys. . . .

The parties are to be commended for attempting to solve their own difficulties. On defendant's store front, . . . stationery, envelopes, business cards, etc., . . . [appears] his full name "Leo McCoy." . . . One other thing the defendant has done to solve the problem. On his business card and in the classified and telephone listing he bills himself as "The Real McCoy." That, the plaintiffs definitely do not like! They claim that is carrying the attempt to differentiate too far. They say that that implies that plaintiffs are not real McCoys.

Perhaps this is the first court in the world that has ever had to determine the meaning of the celebrated phrase, "The Real McCoy." There is a historical dispute as to how it originated. As a student of Americana and as one who has slept and eaten in the hospitable mountain cabins of the feudin' McCoys of Peter Creek Hollow in Pike County, Ky.—along which hollow the rifles of a former generation of McCoys, in ambush, once dropped 16 Hatfields at once—it was surprising to learn that the authorities do not credit one of these with being the original "Real McCoy."

One version, that of O. O. McIntyre, is that the phrase originated when a drunk picked a quarrel with Kid McCoy, welterweight champion of the world, refusing to believe that he was the prize fighter. After discovering his mistake and picking himself off the floor, as part of the res gestae he exclaimed, "It's the real McCoy." Another version attributes the phrase to Bill McCoy, notorious Atlantic coast rum-runner in the early days of prohibition who was so honest, the version says, that he carried only the best liquor; accordingly, "The Real McCoy," came to signify quality. . . .

Whichever version one takes, certainly it must be said that the phrase is in daily use among the American people; that it is doubtful that there is a living McCoy who has not on occasion referred to himself as "The Real McCoy;" and that when he did so he did not mean that all other McCoys were spurious. The truth here is that both of these McCoys are "Real McCoys." . . . Plaintiffs' petition for injunctive relief is denied.

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